

MINUTES

Advisory Committee on Model Civil Jury Instructions

December 12, 2011

4:00 p.m.

Present: John L. Young (chair); Honorable William W. Barrett, Jr.; Francis J. Carney, Marianna Di Paolo, Phillip S. Ferguson, Tracy H. Fowler, L. Rich Humpherys, Timothy M. Shea, Ryan M. Springer

Excused: Juli Blanch, Honorable Deno Himonas, Gary L. Johnson, John R. Lund, Paul M. Simmons, Peter W. Summerill, Honorable Kate A. Toomey, David E. West

Also present: Paul Belnap, David Cutt, Joseph Joyce; Kevin Simon, Stuart Schultz

Instructions on ski resort injuries.

Several committee members had not received the committee note submitted by Gainer Waldbillig. Mr. Cutt had submitted a memorandum, but not a committee note. Mr. Cutt and Mr. Simon remain divided on whether the legislative amendments to the inherent risk of skiing statutes abrogated the law of *Clover v. Snowbird* and *White v. Deseelhorst*. Mr. Cutt and Mr. Simon agree that CV 1110 and CV 1111 are adequate. They also agree that, since there is no law on whether the inherent risk of skiing is an affirmative defense, CV 1113 on who has the burden of proof is speculative and should be omitted. Mr. Young said that CV 1112, which restates the law of *Clover* and *White*, is all that remains at issue. The committee took no action on CV 1112 at the last meeting.

Mr. Simon said that *Rothstein v. Snowbird Corp.*, 2007 UT 96, supports the conclusion that the inherent risk of skiing statutes have completely regulated ski area liability. Mr. Cutt said that *Rothstein* was a pre-injury release case and not an inherent risk of skiing case. Mr. Cutt and Mr. Simon reported cases in which the trial court judge had and had not included an instruction based on *Clover* and *White*.

The committee will again consider the issue at the next meeting.

Punitive damages

Mr. Humpherys suggesting drafting the phase one instructions so that the phrase "punitive damages" is omitted because some parties and judges do not want to influence the jury until there has been a finding of willful or malicious misconduct. Mr. Humpherys said the jury should be advised why they are being asked whether the defendant's wrongful conduct was malicious.

Mr. Joyce said that there should be no mention of punitive damages until the predicate for them has been established. Mr. Schultz reported Judge Nehring had presided at a trial in which counsel was not permitted to mention punitive damages. Mr. Humpherys is comfortable removing "punitive damages" from the phase one instructions, but is

concerned that jurors may inappropriately punish defendant in the calculation of compensatory damages. Mr. Belnap said it should be up to the judge whether to permit mentioning punitive damages.

Mr. Shea said that the phase one instructions could be re-drafted to omit any references to punitive damages, but there would be less context for the jury. They would ask, in essence, was the conduct willful and malicious, giving definitions for those terms.

The committee discussed ways to present the instructions, including the titles, without the phrase "punitive damages," yet permit lawyers and judges to easily find them on the MUJI webpage.

Mr. Humpherys said that jurors should not be instructed on the legal limit to the ratio of punitive damages. If the jury award exceeds the maximum ratio, the judge can correct the amount after trial.

The committee discussed the definitions and how they might be given to the jury. Mr. Humpherys suggested simply quoting the statute. Mr. Humpherys said that part of CV 2030 is wrong.

Mr. Belnap, Mr. Humpherys and Mr. Joyce will form a workgroup to develop the punitive damages instructions. They might also invite Rich Mrazik and Karra Porter to join them. They will try to have instructions drafted for the February meeting.

Verdict form

Mr. Carney explained the three options he had described in his email. The committee favored listing the categories of economic damages on the verdict form. The committee approved the form as amended.

The meeting ended at 6:00 p.m.